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IN THE

Supreme Court of the United States

OCTOBER TERM—1948

No. 673

ANTHONY SCOCOZZA, an infant, by ERMINO SCOCOZZA, his guardian ad litem, and ERMINO SCOCOZZA,

Petitioners,

—against—

ERIE RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

William J. Dempsey.
ROBERT MCGOWAN SMITH,
Attorney for Petitioners-Appellants.

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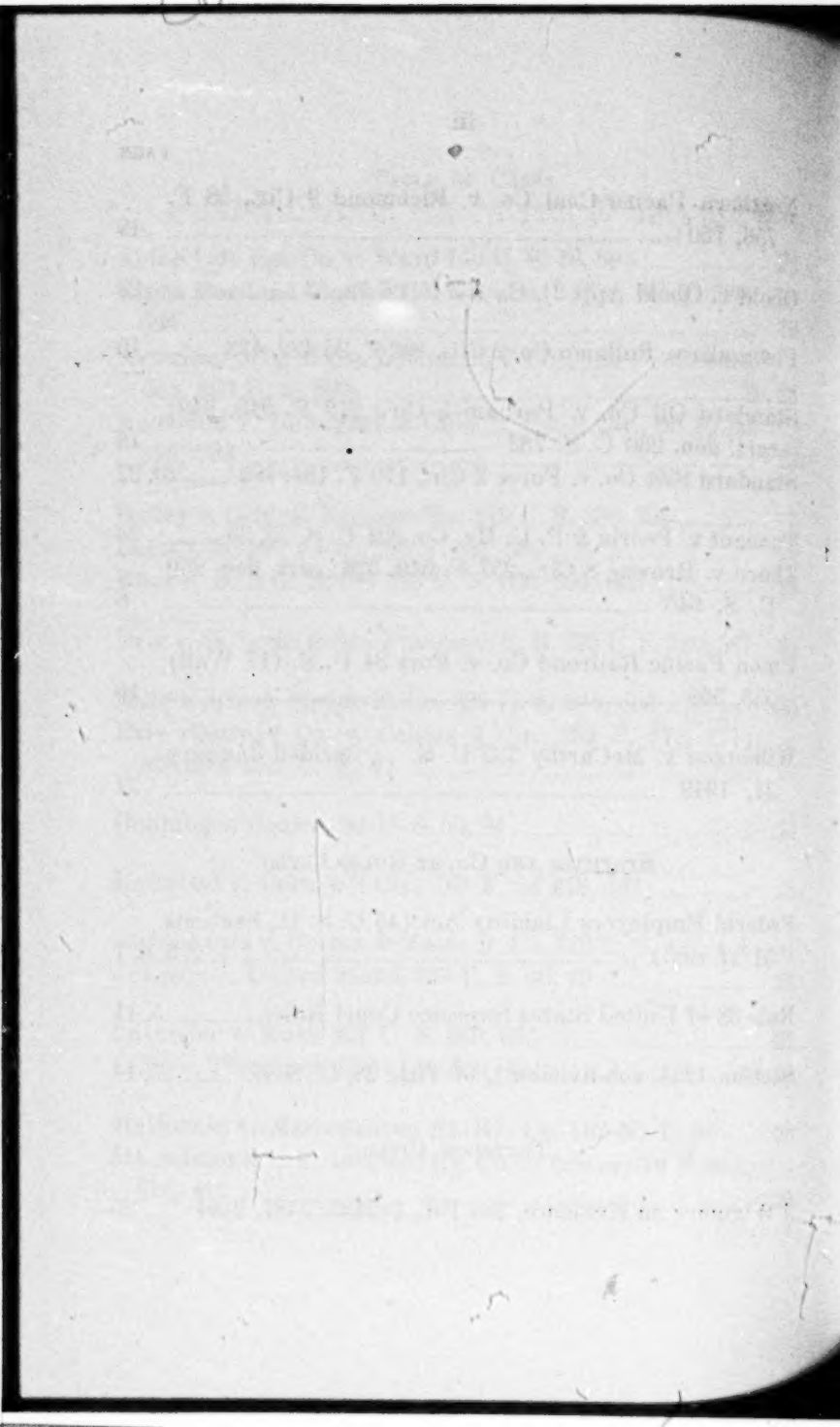

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Anthony Scocozza, by his guardian ad litem, Ermino Scocozza, and Ermino Scocozza, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered herein on the 6th day of January, 1949, which judgment affirmed the judgment of the United States District Court for the Southern District of New York directing a verdict in favor of respondent in an action by petitioners to recover for personal injuries and medical expenses under

the Federal Employers Liability Act. Your petitioners represent to the Court as follows:

FIRST: The complaint contains two causes of action. The first cause of action seeks to recover damages for personal injuries sustained by the infant petitioner,[1] Anthony Scocozza, who was, at the time of sustaining such injuries, an employee of the respondent railroad (4, 5, 6).[2] The second cause of action seeks to recover damages for medical expenses incurred and loss of services sustained by the petitioner Ermino Scocozza, the father of Anthony (6, 7).

SECOND: The respondent's answer admitted that petitioner was in respondent's employ at the time of the accident but denied liability on account of his injuries. By way of affirmative defense the answer pleaded the alleged negligence of petitioner and asserted further that, at the time of the accident, petitioner was not engaged in the employ of respondent in the furtherance of interstate commerce (9, 10).

THIRD: The case was tried before Honorable J. Waties Waring, District Judge, and a jury on the 15th, 16th and 17th days of March, 1948.

FOURTH: The proof, very briefly, showed the following:[3] Petitioner, at the time of the accident on October 21, 1943, was sixteen years of age and had been employed for a short time as a machinist's helper in the Erie Railroad Roundhouse in Jersey City, New Jersey (12, 13, 14, 52).

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1 The infant petitioner will hereafter be referred to as "petitioner."

2 Numerals in parentheses refer to pages of the record in the Court of Appeals unless otherwise indicated.

3 Additional items of evidence will be referred to in the brief.

As a machinist's helper, petitioner worked for the witness, Eugene Gigli, who was a machinist (14, 52). Gigli's duties were to make repairs on locomotives that came off the line into the roundhouse (63, 66, 67); petitioner's duties as helper were to assist Gigli in his work and generally to do as the latter told him (53, 63, 111, 112).

Between seven and nine o'clock in the morning of the day of the accident, 69 locomotives had come off the road into the roundhouse for repairs and Gigli and his helper, the petitioner, had been assigned to work on one of them (67, 111, 113).

About 9:30 A. M., petitioner testified, he saw engine 2527 being moved into position on a track outside the roundhouse. This locomotive had steam up and was to go right out again after repairs had been made (15, 29, 48). Gigli told petitioner that he was going into the roundhouse to sharpen a chisel and instructed petitioner, during his absence, to "check the nuts and bolts" on engine 2527 (39, 41). After Gigli left, petitioner started to check the nuts and bolts on the left front of engine 2527 by striking them with a hammer to find out if they were loose. He discovered one bolt that was stripped and loose and, not having a wrench, got a chisel to work with. As he was engaged in removing the nut and bolt, there was a sudden explosion as a result of which petitioner sustained injuries that resulted in the enucleation of his right eye (15, 16, 17, 32, 33, 39, 41, 44, 135).

Petitioner was completely unable to explain the cause of his misfortune. Immediately after the accident and under questioning by the company doctor who gave him first aid, petitioner stated that he had been "working on engine when something exploded" (78, Petitioner's Exhibit 2). The respondent's claim agent interviewed him in the hospital after his eye had been removed and, in the state-

ment then obtained from him, petitioner was unable to account for the accident (95, 96, 211, 213). And in answer to queries at the trial, petitioner could only reply that he did not know what it was that had exploded (16).

The doctor who removed petitioner's eye sectioned it and removed fragments therefrom. These fragments, together with others found in the petitioner's body, were turned over to the respondent's claim department (70, 120, 135, 221). At the trial respondent claimed that it had had these fragments analyzed and produced an expert witness who testified that they were composed approximately of 95% copper and 5% zinc, a composition known as gilding metal. Such metal, the witness said, is used chiefly in the fabrication of cheap jewelry and bullet jackets (121, 122, 146, 149, 150, 151, 162, 163). On that evidentiary basis, the witness gave it as his opinion that petitioner had been injured by the explosion of a small arms cartridge (158).

FIFTH: Respondent moved to dismiss the first cause of action upon two grounds: (1) that there was no proof of negligence on its part; and (2) that there was no proof that petitioner was engaged in respondent's employ in the furtherance of interstate commerce at the time of the accident (180).

After the Trial Court appeared to be in doubt as to whether petitioner had made out a case on the interstate commerce issue (182), counsel for petitioner offered to reopen the case and introduce additional evidence on that point (186). The Trial Court said that, if it were going to decide the motion in question on the interstate commerce issue, it would certainly permit petitioner to put in additional testimony but that it was going to direct a verdict on the issue of respondent's negligence (186). While it was not sure, the Court said, that respondent's explana-

tion of the accident was correct, nevertheless, it thought that petitioner's case was "utterly incredible" (188) and ruled that it would not submit the case to the jury because, if the jury found for petitioner, the Court would set aside the verdict (189).

The motion to direct a verdict on the second cause of action was granted on the ground that there was no proof that petitioner's father had incurred any medical expenses —the Erie had paid all such expenses—or that his father supported him (184, 185).

On that basis the complaint was dismissed in its entirety.

SIXTH: From the resulting judgment for respondent, petitioners appealed to the United States Court of Appeals for the Second Circuit. On January 6, 1949 that Court affirmed the judgment appealed from.

SEVENTH: This petition seeks a review of the judgment of the Court of Appeals affirming the judgment of the District Court in favor of respondent.

Jurisdiction

The original jurisdiction of the United States District Court in this case is based upon the provisions of the Federal Employers Liability Act (45 U. S. C., Sections 51 *et seq.*).

The jurisdiction of this Court is invoked under Section 1254, subdivision 1, of Title 28, U. S. C. and Rule 38 of the Rules of this Court.

Opinions Below

No formal opinion was rendered by the District Court. The opinion of the Court of Appeals is reported in 171 F. (2d) 145. It appears in the certified copy of the record filed in the office of the Clerk of this Court and is printed as Appendix A, annexed to the brief in support of this petition.

Statement of the Matter Involved

The trial judge put out of the case the issue whether petitioner was engaged in interstate commerce at the time of the accident (186). If the court had regarded that issue as of decisive importance, petitioner, as he offered to do, could easily have remedied any defect in his proof. The trial judge, indeed, conceded that petitioner was in a position to remedy any such defect but refused him the opportunity solely because the judge thought that there was no proof of negligence (186). In these circumstances, if the judgment for respondent cannot be sustained on the ground adopted by the trial court, it cannot be sustained on the ground of lack of proof with respect to the interstate commerce issue.

> *Thorn* v. *Browne*, 8 Cir., 257 F. 519, 528; cert. den. 250 U. S. 645.

Contributory negligence on the part of the petitioner would not, of course, bar his recovery (45 U. S. C., Section 53). Consequently, the first issue in the case is whether the proof herein made out a question of fact for the jury. The second issue is raised by the opinion of the Court of Appeals herein in which that court laid down the following

rule regarding the quantum of proof required to make out a *prima facie* case; viz., that, "The requirement that conflicts in the evidence be resolved as favorably to the plaintiff as is possible always means that the judge must decide whether impartial members of the jury could, with reason, decide that the plaintiff's alleged cause of action was proved by evidence which outweighed at least a little all that was to the contrary."

Questions Presented

1. Whether the proof in the record herein made out a question of fact for the jury;

2. Whether the Court of Appeals was right in formulating its rule regarding the quantum of proof required to make out a *prima facie* case of negligence in an action under the Federal Employers Liability Act.

Reasons for Granting the Writ

1. This Court has said with regard to taking from the jury the issues of fact in suits by workingmen under the Federal Employers Liability Act that; "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." (*Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 354.) As the annexed brief attempts to demonstrate, the proof in the present case presented questions of fact for the jury on the issue of respondent's negligence. Consequently, the direction of a verdict against petitioner raises a substantial question of law justifying review by this Court.

2. This Court has repeatedly held that, upon a respondent's motion for a directed verdict in a jury case, questions of credibility are to be resolved in the petitioner's favor and that the only test is whether, looking only to the evidence tending to support the petitioner's case, that evidence is sufficient to go to the jury. The Court of Appeals in the present case has based its conclusion upon grounds wholly contrary to the decisions of this Court, holding that the credibility of a petitioner's testimony must be weighed against the other evidence in the case and that the petitioner cannot go to the jury unless he has, in effect, proved his case by a preponderance of the evidence.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for the writ should be granted as the fundamental questions involved in this application are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Respectfully submitted,

ROBERT MCGOWAN SMITH,
Attorney for Petitioner.

Dated: Brooklyn, New York
March 24, 1949.

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.*:

Anthony Scocozza and Ermino Scocozza, each being severally duly sworn, depose and say that they are the petitioners herein; that they have read the foregoing petition and know the contents thereof, and that the same is true to their own knowledge, except as to the matters therein stated to be alleged upon information and belief and, as to those matters, they believe it to be true.

ANTHONY SCOCOZZA

ERMINO SCOCOZZA

Sworn to before me, this
24th day of March, 1949.

FRANCIS J. MCLAUGHLIN
Notary Public State of New York
Residing in Kings County
Kings Co. Clk's No. 141; Reg. No. 134 Mc 9
Commission expires March 30, 1949

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition for certiorari should be granted.

ROBERT MCGOWAN SMITH,
Attorney for Petitioners.

Dated: Brooklyn, New York
March 24, 1949.

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Petitioners,

—against—

ERIE RAILROAD COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinions Below

No opinion was written by the District Court. The opinion of the Court of Appeals is reported in 171 F. (2d) 145 and a copy is annexed to the petition herein and marked Exhibit A.

Jurisdiction

Jurisdiction of this Court is invoked under Section 1254, subdivision 1, of Title 28, U. S. C. and Rule 38 of the Rules of this Court.

Statement

Petitioners appeal from a final judgment (226), entered on March 17, 1948, in favor of respondent. The case was tried before Honorable J. Waties Waring, United States District Judge, sitting in the Southern District of New York, and a jury, on March 15, 16, and 17, 1948 (1). At the close of all the evidence the trial judge directed a verdict (185, 190) in favor of respondent on both causes of action contained in the complaint.

Facts

In view of the holding of the Court of Appeals that the petitioner's testimony was completely overcome by the other evidence in the case, counsel for petitioner respectfully asks that the Court indulge his following full statement of the proof adduced at the trial.

The accident occurred at about 10 AM on October 21, 1943 (14). At the time petitioner was sixteen years of age and had been working for respondent railroad for somewhat less than nine months (12, 24). Prior to that time he had been employed for a few months as an usher in a theatre (22, 23).

Petitioner's first job with the Erie was working in the coal pit; later he was assigned to lubricate the locomotives (13). Thereafter, and for a short time prior to the accident, he worked as a machinist's helper and was so engaged at the time of his injuries (14, 52). His place of employment was in the Erie Railroad Roundhouse in Jersey City (13, 14, 52).

As a machinist's helper petitioner worked for the witness, Eugene Gigli, who was a machinist (14, 52). Gigli was

required to make repairs on locomotives in the roundhouse (63, 66, 67). Petitioner's duties as helper were to assist Gigli in his work and to do as the latter told him (53, 63, 111, 112). Gigli testified that petitioner was "a good boy" and "a good helper" and that he was trying to learn how to use the tools (53, 62) but that he liked to play with and experiment with the tools, such as hitting things with the hammer and chisel or trying to put a 7/8 inch wrench on a one and a quarter inch nut (52, 53, 62).

On the day of the accident 69 locomotives had come off the road into the roundhouse for repairs between 7 and 9 o'clock in the morning and Gigli and his helper, the petitioner, had been assigned to work on one of them (67, 111, 113).

Petitioner testified that he had come on the job that morning at 8 o'clock (14). About 9:30 he saw a locomotive—the number of which was 2527—being moved into a position on a track outside the roundhouse. The engine had steam up and was hot and was to go right out again after repairs had been made (15, 29, 48).

Gigli told petitioner, according to the latter, that he was going to the roundhouse to sharpen a chisel and instructed petitioner, during his absence, to "check the nuts and bolts" on engine 2527 (39, 41). After Gigli went inside the roundhouse, petitioner put his tools on the platform on the front of the locomotive and proceeded to check the nuts and bolts on the left front of the engine, as Gigli had directed (15, 16, 33, 39, 41).

Another locomotive stood in front of 2527 but the two were not coupled together. No one was aboard 2527 and there was no one else near either locomotive (41, 47).

Petitioner checked the bolts by striking them with a hammer to see if any were loose (16, 32). He found one bolt that was stripped and loose and, not having a wrench, got

a chisel to work with (16, 33). As petitioner was endeavoring to remove the nut and bolt to replace them with new ones, there was a sudden explosion, petitioner was knocked to the ground and became unconscious for a few minutes 16, 44). Then one or more fellow workmen helped him to go, first, into the roundhouse to the supervisor and, thereafter, to the first aid station (16, 17). Petitioner was bleeding from the head and chest and could not see out of one eye (17).

The witness John F. Moriarty was in the first aid station when petitioner was brought there. He was a physician retained and paid by the respondent railroad company (68, 69, 73, 74). The minute that petitioner was brought into the first aid room, Dr. Moriarty asked him what had happened to him and petitioner stated, according to the doctor's testimony, that he had been (78, Petitioner's Exhibit 2) "working on engine when something exploded." In answer to queries at the trial whether it was the bolt or the chisel that had shattered, petitioner could only reply that he did not know what it was that had exploded (16).

Petitioner was taken from the first aid station to St. Francis Hospital where, on the following day, his right eye was removed (17, 135).

He had received no powder burns (79, 80, 81) but did have a number of large black scars on his face, chest and hands (19). Although Dr. Moriarty had made no notes with reference to these black scars, he admitted that pieces of metal covered with carbon or coal dust frequently leave dark scars and that the thing that caused petitioner's scars might well have been covered with coal dust and ashes (82).

Within five days after petitioner's eye had been removed and while he was still confined to bed, a statement was obtained from him by the Erie Railroad Claim Department (118, 119). Permission for the interview was obtained by

the Erie Railroad claim agent from Dr. Moriarty, the Erie's doctor (71, 74) but the boy's parents were not consulted (129). At the trial petitioner testified that he did not remember the interview and the hospital record contained an order prescribing morphine for petitioner on October 27, 1943, the day of the interview (75, 76, 139, Plaintiff's Exhibit 1). The doctors who testified for the railroad claimed that no morphine was given after October 22nd and that either the date on the order in question was wrong or counsel for petitioner was misreading it (84, 85, 86, 135, 136).

In this interview with the Erie claim agent, petitioner said in substance, according to the notes made by a court stenographer, that, at the time of the accident, he was hammering on a nut to smooth it down and had not been told to do so (95, 96).

The doctor who had taken out petitioner's eye, sectioned it and removed fragments therefrom. These fragments, together with others found in petitioner's body, were turned over by the railroad's doctors to the railroad's claim department (70, 120, 135).

The respondent's evidence tended to show, first of all, that the locomotive, on which petitioner had been working at the time of the accident, had been in storage for 12 days beforehand and remained in storage for almost a year afterwards (55, 56, 60, 61, 104, 105). Secondly, respondent's evidence showed the following with regard to the cause of petitioner's injuries.

Eugene Gigli, who was not an eyewitness of the accident, testified that, about a month thereafter, petitioner told him that he had been "playing with two inch and a quarter nuts" and "all of a sudden they exploded" (58, 59).

Florentino Gallo, a machinist's helper, employed by the respondent for thirty years, also testified for the defense

(87, 88). His testimony was that he was standing one or two feet away from petitioner when the latter was injured by the explosion of a "fuse". By a "fuse" he meant the kind of fuse that is used in a lead box (89, 130). After the explosion, the witness continued, he saw some pieces that looked like bronze or copper lying on the ground but there were no marks of any burns. The fragments were picked up by Mr. Gardiner, respondent's general foreman (89, 90, 91, 92).

Eugene Gigli, who said he came on the scene ten minutes after the accident, saw these particles lying on the ground and said that he also noticed a dent, with a copper particle in it, in the rear of engine 2552, the locomotive that stood in front of 2527 (57, 58). Mr. Gardiner, respondent's general manager, picked up the copper particles and put them in his pocket (57).

Jeremiah Driscoll, respondent's master mechanic at the Jersey City Roundhouse (102), also arrived on the scene after the accident. He testified that he saw the metallic particles on the ground and also a 1/8 inch dent punched into the rear of locomotive 2522. The tank of the locomotive, he said, is as hard as steel and the dent indicated that some object had hit the tank because the dent was not there originally (107, 108).

The fragments from petitioner's eye and body which had been turned over by the doctors to the respondent's claim department were sent to a laboratory for analysis (121, 122). An expert witness produced by respondent at the trial testified that the fragments were composed of approximately 95 per cent copper and approximately 5 per cent zinc, a composition known as gilding metal (146). Such metal, he said, is employed chiefly in the fabrication of cheap jewelry and bullet jackets (149). By the term, "bullet jacket," the witness meant the metal casing enclosing a lead

core, which is the projectile or tip of the bullet, the projectile being the solid piece of metal that is propelled forward by the explosion of the cartridge (150, 151, 162, 163). On the basis of the foregoing, the witness gave it as his opinion that petitioner was injured by the explosion of a small arms cartridge (158).

One of the doctors who testified for respondent admitted, however, on cross-examination, that if petitioner had exploded a bullet, as claimed by defendant, he would probably have sustained powder burns. This medical witness said (80); "I would expect to find some powder burns if the explosion * * * well, you would probably expect to find powder burns."

POINT I

The record presents questions of fact that should have been submitted to the jury.

"A"

The Respondent was Negligent

Petitioner's proof shows the following facts with regard to respondent's negligence:

(1) Petitioner was a boy of sixteen, with no mechanical training and almost no business experience (12, 13, 14, 22, 23, 24, 52);

(2) This boy was employed by respondent in its yards (13, 14, 52); in these yards as many as 69 locomotives at one time came off the line for immediate repairs (111, 113);

(3) Petitioner was completely unfamiliar with his job and was only beginning to learn to use tools; instead of

using these tools properly, he would experiment with them and play with them (52, 53, 62);

(4) Petitioners' immediate boss, Gigli, knew of his unfamiliarity with his job and cautioned him about the use of tools (53);

(5) Despite his knowledge of petitioner's inexperience and youthful propensity for mischief, Gigli, on the day of the accident, ordered him to work alone on a locomotive that required immediate repairs (39, 41);

(6) Gigli left petitioner alone and without superintendence in the railroad yards while the youth was engaged in that work (15, 16, 33, 39, 41);

(7) The place where petitioner was ordered to work presented a latent peril that was not obvious to him (89, 90);

(8) Petitioner placed his tools on the front of engine 2527 and, while he was working on the left front of the engine, an explosion occurred, causing the injury complained of (16, 32, 33, 44).

The evidence summarized above, it is respectfully submitted, created questions of fact with regard to respondent's negligence.

Respondent owed a two-fold obligation to its youthful employee. For one thing, its obligation to provide him with a safe place to work is measured by petitioner's age and experience. Where an employer requires immature and inexperienced workmen to perform duties in places that are dangerous for such immature and inexperienced per-

sons, the employer may he held liable for injuries received by such employees on account of the character of the premises.

Alpha Portland Cement Co. v. *Curzi* 2 Cir., 211 F. 580, 584
See also *Standard Oil Co.* v. *Parham* 5 Cir., 279 F. 945, 949; cert. den. 260 U. S. 733
Pieczonka v. *Pullman Co.* 2 Cir., 102 F. 2d 432, 433

Beyond that, moreover, respondent owed the youthful and inexperienced petitioner a duty not to impose on him tasks that were beyond his powers and the execution of which involved hazards against which petitioner was not capable of protecting himself. Gigli, of course, stood in the position of vice-principal to petitioner and his direction to the latter to perform, alone and without superintendence, tasks that brought him into a position of danger is chargeable to the respondent employer.

Union Pacific Railroad Co. v. *Fort* 84 U. S. (17 Wall) 553, 558
Northern Pacific Coal Co. v. *Richmond* 9 Cir., 58 F. 756, 760
Betts v. *Bisher* 9 Cir., 213 F. 581, 586

The same principle is applicable in all cases where the injured employee is under an incapacity, due to age, sex, mentality, inexperience, etc., that leaves him open to injury in the place or in the capacity in which he is employed by his master.

Lillie v. *Thompson* 332 U. S. 459
Blair v. *B. & O. R. Co.* 323 U. S. 600, 604, 605

American Mfg. Co. v. *Zulkowski* 2 Cir., 185 F. 42, cert. den. 220 U. S. 609
Standard Silk Co. v. *Force* 2 Cir., 170 F. 184, 186
Erie Railroad Co. v. *Collins* 2 Cir., 259 F. 172, 177; affirmed 253 U. S. 77

"B"

Respondent's Negligence was the Proximate Cause of Petitioner's Injuries

Petitioner was unable to explain the precise cause of his injuries. In that testimony he was entirely honest, as the record shows. Thus immediately after the accident, when he was taken into respondent's first aid station for help and under questioning by respondent's doctor, he could only say that he had been "working on engine when something exploded" (78 Petitioner's Exhibit 2). A month after the accident he is supposed to have told Gigli that he had been playing with two one inch and a quarter nuts which suddenly exploded (58, 59). If that statement were, in truth, made by petitioner, this completely absurd explanation of his misfortune amply demonstrates that the youth was utterly bewildered as to the cause of his accident.

That honest inability to explain the reason for his misfortune does not bar petitioner from a recovery. First of all, it is undeniable that respondent's negligence in employing an immature and inexperienced boy of 16 in its railroad yards and its requiring this boy to perform, without superintendence, tasks that exposed him to latent dangers, contributed, at least in part, to petitioner's injuries. That alone would make respondent liable to respond in damages.

Lillie v. *Thompson* 332 U. S. 459, 462
Ellis v. *Union Pacific R. Co.* 329 U. S. 649, 653
Henwood v. *Coburn* 8 Cir., 165 F. 2d 418, 423

But, beyond that, an unexplained explosion in an employer's premises is an extraordinary occurrence from which a jury might properly draw an inference that it was caused by negligence.

See *Johnson* v. *United States* 333 U. S. 46, 49
Lavender v. *Kurn* 327 U. S. 645, 653

There were only two possible agencies that could have been the negligent cause of the accident. One such possible agency was the petitioner himself and, of course, it was respondent's theory that petitioner caused his own injury by exploding a bullet with a hammer and chisel. But, if the jury rejected that explanation—as it might properly do (see discussion under subpoint "C", *infra*)—the only other possible negligent agency was the respondent. The explosion took place on respondent's premises and, if its assertion of petitioner's negligence be rejected, the accident occurred when petitioner—put in a place of danger by respondent—inadvertently came into contact with a dangerous instrumentality or object therein, In that state of things, the respondent may be held liable.

Jesionowski v. *Boston & Maine R. Co.* 329 U. S. 452, 458
See *Johnson* v. *United States* 333 U. S. 46

"C"

Respondent's Explanation of the Accident was not Conclusive

Respondent, immediately upon the happening of the accident, put the petitioner in the hands of its own doctors. These doctors, after removing petitioner's eye, sectioned it without his consent and turned over the fragments found

in the eye to respondent's claim department. The fragments found in petitioner's body were also turned over by the doctors to the claim department (70, 120, 121, 122, 135, 146). These fragments were not produced by respondent until the trial.

Moreover, within a few days after the accident and while petitioner was still confined to his bed in the hospital—and perhaps, too, while he was under the influence of morphine (75, 76, 139, Petitioner's Exhibit 1)—the respondent's claim agent, accompanied by a court stenographer, and without notice to the boy's parents, confronted him alone in his hospital bed and obtained a statement from him (71, 74, 118, 119, 129).

Thereafter, at the trial, the respondent contended that petitioner had caused his own injuries by striking a bullet with a hammer and chisel, basing this theory upon the opinion testimony of a metallurgist under whose direction the fragments taken from petitioner's body had been analyzed.

That defense, of course, could be no more than a theory, because it was not based on direct evidence from eye-witnesses but only on a chain of circumstantial evidence. Its plausibility, therefore, was a question for the jury.

Standard Silk v. *Force* 2 Cir., 170 F. 184, 186

In addition, there are evident inconsistencies between respondent's theory and the record. For one thing, respondent's theory seems to assume that petitioner was hammering on engine 2552—in which a dent was found after the accident (57, 58, 107, 108)—whereas the testimony both of petitioner and of Gallo is that petitioner was hammering on engine 2527. Secondly respondent's theory supposes that the petitioner could explode a bullet at close range without suffering powder burns although there is testi-

mony in the record from respondent's own medical witness that powder burns would probably result (80). Finally, respondent's theory would require the Court to believe that the solid tip of a bullet would not only mushroom upon striking an object but would also shatter in fragments (163, 169). The effect of such expert testimony was, of course, not conclusive but was for the jury to evaluate.

Aetna Life Ins. Co. v. *Ward* 140 U. S. 76, 89
Anderson v. *Baltimore & Ohio R. Co.* 2 Cir., 96 F. 2d 796, 798
Obold v. *Obold* App. D. C., 163 F. 2d 32, 33

In *American Mfg. Co.* v. *Zulkowski,* 2 Cir. 185 F. 42, cert. den. 220 U. S. 609, the Court made an observation which is peculiarly applicable to the present case where the defense is that petitioner exploded a bullet with a hammer and chisel (see pp. 46-47 of 185 F.):

> "In deciding that the defendant's theory was not a fair version of the accident, the jury were justified in considering the ordinary instincts of self-preservation which govern human conduct. Even the most ignorant laborer would know that if he placed his hand in such a position it would surely be caught and injured. No expert knowledge was required to enable him to appreciate this self-evident fact. And in support of his theory that the machine started automatically, the jury were justified in considering the improbability that he would do an act that would seem to impeach his sanity."

POINT II

The Court of Appeals erred in holding petitioner's proof insufficient.

In *Wilkerson* v. *McCarthy*, 335 U. S. , decided January 31, 1949, this Court said that: "It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."

Moreover, this Court has repeatedly said that for the purposes of a motion to direct a verdict for the defendant, questions of credibility, like all other disputed questions of fact, are to be resolved in favor of the plaintiff.

Delk v. *St. Louis & San Francisco R. R.* 220 U. S. 580, 587
Gunning v. *Cooley* 381 U. S. 90, 94
Tennant v. *Peoria & P. U. Ry Co.* 321 U. S. 29, 35
Wilkerson v. *McCarthy, supra.*

In the instant case the Court of Appeals disregarded that principle in ruling that "the assertion of an interested party"—i.e., the petitioner herein—was alone insufficient to carry the issue of respondent's negligence to the jury when that testimony was opposed to what the Court termed "known facts and reasonable inferences drawn from them". Further the Court ruled that; "The requirement that conflicts in the evidence be resolved as favorably to the plaintiff as is possible always means that the judge must decide whether impartial members of jury could, with reason, decide that the plaintiff's alleged cause

of action was proved by evidence which outweighed at least a little all that was proved to the contrary."

In so ruling, it is respectfully submitted, the Court of Appeals held that a plaintiff does not make out a *prima facie* case unless he proves his cause of action by a preponderance of the evidence. That ruling confuses the principles governing the quantum of proof necessary to go to the jury with the principle that a jury's verdict for one party or the other may be set aside where it is not in accord with the preponderance of the evidence. The former involves questions of law; the latter questions of fact. Each, moreover, entails different consequences; failure to make out a *prima facie* case justifies dismissal of the cause of action whereas failure to prove the cause of action by a preponderance of the evidence invites no more than the hazard of another trial.

9 Wigmore on Evidence, 3rd Ed., §§2485, 2487, 2494

Mt. Adams & E. P. Inclined Ry. Co. v. *Lowery* 74 F. 463, 476, 477

McDonald v. *Metropolitan St. Ry Co.* 167 N. Y. 66

This error was of decisive importance in the present case because, as the opinion of the Court of Appeals appears to concede, should the petitioner's proof herein be taken at its face value, the judgment dismissing the complaint must be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Brooklyn, New York
March , 1949.

Respectfully submitted,

ROBERT MCGOWAN SMITH,
Attorney for Petitioners-Appellants.

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ANTHONY SCOCOZZA, an infant, by ERMINO SCOCOZZA, his guardian ad litem, and ERMINO SCOCOZZA,

Plaintiffs-Appellants,

—against—

ERIE RAILROAD COMPANY,

Defendant-Appellee.

Before:

L. HAND, CHASE and FRANK,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York. Affirmed.

CHASE, *Circuit Judge*:

At the close of all the evidence, a verdict was, on defendant's motion, directed for the defendant in this suit brought under the Federal Employers' Liability Act in the District Court for the Southern District of New York. This appeal is from the final judgment entered on that verdict and the only issue is whether there was enough evidence of the defendant's negligence to require the submission of that question to the jury.

The suit was brought by the father and guardian ad litem of a minor to recover damages for personal injuries to the minor who was accidently hurt while employed by the appellee as a mechanic's helper. The boy, nearly seventeen years old when the accident occurred, had been working for the appellee for about nine months and for a few months had been helping mechanics inspect and repair equipment. According to the plaintiff's testimony, he was told by his boss on the morning he was hurt to check the nuts on a steam locomotive which had been brought off the line for inspection and was standing with steam up on a track just outside a round house. The boss then left him to his task and went inside to sharpen a chisel.

What then happened to the boy is shown for the most part by his own testimony, which was all the evidence the plaintiff introduced. He testified that in checking the nuts on the engine by hitting them with a hammer he came to one which was different from the others in that it was "stripped loose" and he took it off. When asked, "How did you go about it?" he answered, "I went over and got a chisel and I hit it once or twice, and the third time something went off and I didn't know what hit me." He also said the nut was on a bolt which was attached, he thought, to some kind of a rod. On cross-examination he testified that the nut was a round one at the middle of the left side of the engine on a bolt which was there to hold something —what that was he didn't know. He said it was "one by one" in size and was the first nut he checked on the engine. He hit it with a hammer and "then it was loose." He said both that he couldn't get it off by hand and that he didn't try to unscrew it by hand. It, and the bolt it was on, looked like iron but he didn't know whether they were made of iron. The nut had grooves across the top.

Other evidence in the record shows that after he was hurt the boy was taken to a hospital where his left eye was removed and metal particles were taken from the eyeball and from his left hand. Tests of these particles showed that they were composed of a little over 95% copper, the remainder being mostly zinc and lead with traces of iron and other elements. Such material is known as gilding metal and is used mainly in making inexpensive jewelry and for covering the lead cores of bullets used in making small arms ammunition. There was no evidence that any such metal is used in or on this locomotive.

Still other evidence tended to show that when what he struck exploded the boy was hitting with a hammer some object on the front platform of the engine, instead of checking the nuts as he testified that he was told to do, and that that object was a small arms cartridge.

"The railroad is liable in this suit only if it was guilty of negligence which caused the accident. But the plaintiffs were entitled to have that issue submitted to the jury if the evidence, viewed in its light most favorable to them, was sufficient to make out a prima facie case. Randall v. Baltimore & Ohio R. Co., 109 U. S. 478; Delk v. St. Louis & San Francisco R., 220 U. S. 580; Gunning v. Cooley, 281 U. S. 90, Lavender & Kurn, 327 U. S. 645. This does not mean, however, that the assertion of an interested party is alone sufficient to carry the issue of the railroad's negligence to the jury when it is so opposed to known facts and reasonable inferences drawn from them that members of a jury could not fairly reconcile it with those established facts. Redman v. Baltimore & Carolina Line, Inc., 2 Cir., 70 F. 2d. 635, 637, modified on other grounds, 295 U. S. 654. The requirement that conflicts in the evidence be

resolved as favorably to the plaintiff as is possible always means that the judge must decide whether impartial members of the jury could, with reason, decide that the plaintiff's alleged cause of action was proved by evidence which outweighed at least a little all that was to the contrary. Myers v. Reading Company, 331 U. S. 477. Applied to this case that means that before the Jury could lawfully return a verdict for the plaintiffs it had to be able to find not only that the boy's version of the cause of his injuries was the correct one but also that prudence required the defendant to foresee some likelihood that such an explosion as that described by him might occur and to take steps to protect the boy from such a danger. The defendant railroad was not an insurer, and there is nothing whatever in this record to show that it did, or should, have had even the slightest intimation that hitting the nuts on this engine would cause anything to explode. There was, therefore, insufficient evidence of negligence of the defendant on which to go to the jury. Brady v. Southern Ry. Co., 320 U. S. 476; Trust Co. of Chicago v. Erie R. Co., 7 Cir., 165 F. 2d. 806, cert. denied, 334 U. S. 845; Eckenrode v. Penn. R. R. Co., 335 U. S. 329 affirming, 3 Cir., 164 F. 2d. 996."

The direction of the verdict was accordingly, not erroneous. *Penn. R. R. Co.* v. *Chamberlain*, 228 U. S. 333; *Redman* v. *Baltimore & Carolina Line, Inc., supra.*

Judgment affirmed.